RAJAMANIKAM ADAIKALAM

v.

BOLTON FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: S2-22-412-1996]
13 SEPTEMBER 1997

LAND LAW: *Sale of land - Auction - Failure of successful bidder to pay full purchase price within stipulated time - Whether contract secured under auction lapsed - Extension of time to pay granted with chargee's consent but without notice to chargor - Whether extension void - Whether bidder has no locus standi to apply for injunction to restrain chargee from disposing property in a second auction - Whether grant of injunction would be contrary to s. 54(k) Specific Relief Act 1950*

CIVIL PROCEDURE: *Injunction - Injunction to restrain chargee and chargee's agents or servants from disposing property in a public auction - No public official cited as party - Whether Registrar of High Court or sheriff is a servant or agent of chargee - Whether grant of injunction amounts to restraining public official - Specific Relief Act 1950, s. 54(c) - Government Proceedings Act 1956, s. 29(2)*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Failure to give undertaking as to damages - Whether applicant must give such undertaking - Whether failure to give undertaking must result in dismissal of application for interlocutory injunction*

LAND LAW: *Sale of land - Auction - Responsibility of bidder - Whether bidder ought to make search of property before auction - Whether bidder cannot blame existence of caveat for failing to raise loan to make payment within time*

The plaintiff was the successful bidder in a public auction but he failed to pay the full purchase price within the time stipulated in the proclamation of sale. As a result, the defendant obtained an order to put the property in question up for a second auction. This was the plaintiff's application for an injunction to stop the defendant, its workers or agents from disposing of the said property in a public auction. No undertaking of damages was given by the plaintiff. It was in evidence that the senior assistant registrar ('SAR'), with the consent of the defendant, had granted an extension of time for the plaintiff to effect payment but the plaintiff failed to make payment even within the

extended time. The plaintiff contended that a private caveat lodged by the defendant over the said property which was not removed prior to the auction had impeded his loan application thus preventing him from effecting payment of the full purchase price. The defendant, on the other hand, argued that the plaintiff's application was contrary to s. 54(c) of the Specific Relief Act 1950 and s. 29(2) of the Government Proceedings Act 1956 as it amounted to an attempt to restrain the Registrar of the High Court or the sheriff, being a servant or agent of the defendant, from conducting an auction.

Held:

[1] Since no evidence had been proffered as to whether notice had been given to the chargor of the extension in the instant case, or whether his consent for the grant of the extension had been obtained, the extension given by the SAR was void as being ultra vires the National Land Code 1965.

[2] The contract secured under the public auction lapsed when the plaintiff failed to pay the balance of the purchase price within the time stipulated in the proclamation of sale. Therefore, with the lapse of the contract, the plaintiff herein had no *locus standi* to bring this application.

[3] Having held that the plaintiff had no *locus standi* to bring this application, applying s. 54(k) of the Specific Relief Act 1950 which provides that no injunction ought to be granted where the applicant has no personal interest, this application for an injunction must therefore fail.

[4] Since a caveat was lodged and existing at the time of the auction, the plaintiff is presumed to have knowledge of its existence if at all the existence of the caveat was not announced prior to the auction as the plaintiff ought to have made a search in the land office before the auction. The plaintiff cannot now blame the existence of the caveat for his inability to obtain a loan.

[5a] Section 54(c) of the Specific Relief Act 1950 does not apply to prevent the grant of an injunction in the instant case. The injunction sought is to restrain the defendant from auctioning the said property and of course public officials will be involved. However, no public official has been cited as a party and further, by no stretch of the imagination can it be said that the Registrar of the High Court or the sheriff who conducts the auction is a servant or agent of the defendant. If it were to be otherwise, then no aggrieved litigant can ever apply for any injunction against any defendant so long as that defendant can by implication drag in any department of the government.

[5b] Section 29(2) of the Government Proceedings Act 1956 refers to an injunction indirectly sought against any department of the government or its officials. Here, no governmental department or official was cited as a party.

[6] An applicant applying for an interlocutory injunction must give his undertaking as to damages in the said application. This is essential as the interlocutory injunction is granted before trial and therefore before the merits of the case have been finally determined. This requirement to give an undertaking as to damages is also provided for in Form 58 of the Rules of the High Court 1980. On the plaintiff's failure to provide the undertaking as to damages, this application must fail.

[Application dismissed.]

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
Ho Kok Thin & Ors v. The Sheriff/Registrar of the High Court Borneo & Anor [1989] 3 MLJ 181 ***(dist)***
Lim Kit Siang v. United Engineers (M) Bhd & 3 Ors (No. 2) [1987] 2 CLJ 347 ***(dist)***
M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(foll)***
Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor [1995] 4 CLJ ***(foll)***

Legislation referred to:
Government Proceedings Act 1956, s. 29(2)
Specific Relief Act 1950, s. 54(c), (k)

For the plaintiff - Watson Peters; M/s Watson Peters & Mohd Fuad
For the defendant - Delia Chair; M/s Soo Thien Ming & Nashrah

Reported by Izzaty Izzudin

JUDGMENT

RK Nathan JC:

The plaintiff was the successful bidder in a public auction held on 11 August 1993 in respect of a property known as H.S.(D) 12089 P.T. 232 Seksyen 90, Bandar Kuala Lumpur, Wilayah Persekutuan (the said property) at the Kuala Lumpur High Court at a purchase price of RM116,000. The defendant is the chargee in respect of the said property.

The plaintiff had on 11 August 1993 paid to the court a sum of RM11,600 being the 10% of the purchase price. The balance of the purchase price was to be paid within 90 days from the date of the sale, to the Senior Assistant Registrar (SAR), High Court Kuala Lumpur, as stipulated in the proclamation of sale.

The plaintiff however failed to pay the balance of the purchase price within the 90 days from the date of the auction and again failed to do so within the subsequent extended time granted by the SAR. The defendant then applied to the court by way of summons for directions for an order to put the said property up for a second auction. The said order was granted on 30 May 1996 and the court fixed the auction on 8 August 1996. The plaintiff had on 7 August 1996 filed a writ and a summons in chambers (encl. 3) against the defendant. By way of encl. 3 the plaintiff is asking for an injunction from this court *inter alia* to stop the defendant, its workers or agents from disposing of the said property in a public auction. As a result of the said application the defendant had postponed the auction fixed on 8 August 1996 to a date to be fixed pending the outcome of this court's decision to encl. 3.

Was The Extension Granted By The SAR Valid

When the plaintiff failed to pay the balance sum by 11 August 1993 the SAR granted an extension of time until 19 November 1994 to enable the plaintiff to effect payment. The plaintiff exhibited the letter of consent from the SAR dated 6 September 1994 as exh. RA-7 to his affidavit. The said letter confirmed that the defendant had given its consent for the said extension. However on the authority of *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15; [1994] 1 MLJ 294 SC I am bound to hold that the extension granted by the SAR was void as being ultra vires the National Land Code (NLC). No evidence has been tendered to show if the chargor/registered owner had been notified of this extension. In the *M&J Frozen Food* case the Supreme Court held that whilst the terms or conditions of sale may be varied, this has to be done by the court after giving the chargor/registered owner the right to be heard. As the court's power to order the sale was derived from the statutory provisions of the NLC after giving the chargor/registered owner the right to be heard, it was manifest that any alteration to the terms or conditions must likewise be heard. The Supreme Court further held that any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor/registered owner was ultra vires the authority to sell under the NLC. Just like the case before me the Supreme Court held that since the extension of the completion date was given without giving any notice to the chargor/registered owner, the order of the SAR was held void as being ultra vires the NLC. Since no evidence has been proferred as to whether notice has been given to the chargor in the case before me, or whether his consent for the grant of the extension had been obtained I hold that the extension given by the SAR in this case up to 19 November 1994 is void as being *ultra vires* the NLC.

Locus Standi

It is not disputed that the plaintiff until now has failed to pay the balance of the purchase price. Indeed he had failed to pay the balance of the purchase price within the 90 days from the date of the auction, *ie*, 11 August 1993. It is my judgment that the contract secured under the public auction lapsed on 12 November 1993 when the plaintiff failed to pay the balance of the purchase price within 90 days from the date of the auction.

In any case the defendant had also given the plaintiff an option by way of its letter dated 27 November 1995 to extend the time for completion of the sale subject to the conditions that the financier of the plaintiff should confirm that the loan applied for by the plaintiff was still valid and subsisting and that the plaintiff agreed to pay interest to the defendant on the balance sum from the date of the auction to the date of the full disbursement of the loan. The plaintiff failed to take this option and did not even bother to reply. The defendant, by its letter dated 5 January 1996 gave a final notice to the plaintiff and stated that if no reply was forthcoming by 15 January 1996 no further extension or indulgence would be given. Even to this there was no response. I therefore hold that even this option had lapsed by 15 January 1996.

In *Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor* [1995] 4 CLJ 416 the plaintiff had failed to pay the balance of the purchase price on or before the date as extended by the Land Administrator. James Foong J held that without such payment, the contract secured by the plaintiff under the public auction lapsed and thus became null and void with the 10% paid earlier liable to be forfeited. He went on to hold that with the contract thus terminated the plaintiff no longer had any legal claim over the same and had no *locus standi*. That was a case relating to the removal of caveats. However it is my considered view that likewise, shorn of his legal entitlement, with the lapse of the contract entered on the day of the auction, the plaintiff herein has no *locus standi* to bring this action, let alone this application.

The Caveat

The plaintiff contended that a private caveat lodged by the defendant over the said property and which was not removed prior to the auction had impeded his loan application and that he had instructed solicitors sometime in 1993 to remove the caveat and that it was removed on 27 November 1995. On 18 July 1996 the plaintiff himself entered a private caveat on the said property "to protect the plaintiff's interest". The plaintiff had also made further application with his financiers, Bank Bumiputra Malaysia Bhd (BBMB), to increase the loan sum from RM60,000 to RM80,000 and this was approved on 11 October 1994.

It is not the concern of the court how the plaintiff proposed to raise his finance to pay for the purchase and what conditions the bank wished to impose before releasing the loan amount. Since a caveat was lodged and existing at the time of the auction the plaintiff is presumed to have knowledge of its existence if at all the existence of the caveat was not announced prior to the auction, as the plaintiff ought to have made a search in the Land Office before the auction. The plaintiff now cannot blame the existence of the caveat for his inability to obtain the loan. In any case since he was informed on 27 November 1995 that the caveat was removed yet on 11 October 1994 BBMB had informed him that the loan for RM80,000 had been approved. In other words even with the existence of the caveat, his loan was approved. Even if there was a caveat, cl. 11 of the conditions of sale reads as follows:

> 11. The property is believed and shall be taken to correctly describe and is sold subject to all easements, liabilities and rights (if any) subsisting thereon or thereover without any obligation arising to define the same respectively and no error, mis-statement or mis-description shall annul the sale nor shall any compensation be allowed in respect thereof.

The said property was therefore sold subject to the existence of the said private caveat.

Specific Relief Act 1950

Section 54(k) of the Specific Relief Act 1950 reads:

> (k) where the applicant has no personal interest in the matter.

Having held that the plaintiff has no *locus standi* it naturally follows that applying s. 54(k) this application for an injunction must therefore fail.

Is There Interference With Public Duties

The defendant argued that the plaintiff's application is for an injunction *inter alia* to prevent the defendant, its workers and agents from disposing of the said property by way of public auction. The defendant relied on s. 54(c) of the Specific Relief Act 1950 which reads:

> (c) to restrain persons from applying to any legislative body;

I reject this argument. The injunction sought is to restrain the defendant from auctioning the said property and of course public officials needless to say will be involved. No public official has been cited as a party. By no stretch of the imagination can I say that the Registrar of the High Court or the Sheriff who conducts the auction is a servant or agent of the defendant for that is what the application seeks, that is to restrain the defendant and/or its servant or agent.

If the submission of the defence is to have force then no aggrieved litigant can ever apply for any injunction against any defendant so long as that defendant can by implication drag in so to speak any department of the Government. The defendant also invited me to consider s. 29(2) of the Government Proceedings Act 1956 which reads:

> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

Again in my view the section refers to an injunction indirectly sought against any department of the Government or its officials. Besides no Governmental department or official has been cited as a party.

In fact in *Ho Kok Thin & Ors v. The Sheriff/Registrar of the High Court Borneo & Anor* [1989] 3 MLJ 181, the second defendant had obtained an order for sale by public auction of a parcel of land. The plaintiffs were the successful bidders at the auction and paid a sum of money into court as deposit towards the purchase price following execution of a memorandum of sale. The plaintiffs alleged that later the first defendant had purportedly and wrongly invalidated the sale by auction and refused to accept the balance of the purchase price when it was tendered and had gone on to return the deposit to the plaintiffs. The plaintiffs also alleged that the defendants intended to proceed with the fresh sale. The plaintiffs brought an action against the defendants and obtained, on an *ex parte* application an interim injunction to restrain the 2nd defendant from proceeding with the intended sale and an order against the first defendant granting a stay of the intended sale by auction. In this case both the Sheriff and the Registrar were cited as parties and the court correctly invoked s. 29(2) of the Government Proceedings Act 1956.

Failure To Give An Undertaking As To Damages

It is trite law that an applicant for an interlocutory injunction must give his undertaking as to damages in the said application. This is essential as the interlocutory injunction is granted before trial and therefore before the merits of the case have been finally determined. In the celebrated landmark case of *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 Lord Diplock said at p. 509:

> ... It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do.

This requirement to give an undertaking as to damages is also provided for in form 58 of the Rules of the High Court 1980 (the RHC) entitled "Order for Interim Injunction". In the case before me the plaintiff has failed to give an undertaking as to damages. Neither in encl. 3 nor in the supporting affidavit has the plaintiff given such an undertaking. The court had, in *Lim Kit Siang v. United Engineers (M) Bhd & 3 Ors (No. 2)* [1987] 2 CLJ 347; [1988] 1 MLJ 50 held that in this kind of public interest litigation to insist on imposing an undertaking as to damages is to thwart "the public-spirited citizen from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped". However it must be noted that in that case the plaintiff, had in his affidavit stated that he was prepared to give the usual undertaking in damages. However the defendants insisted on a "meaningful undertaking in damages". On this failure to provide the undertaking as to damages, this application must fail.